

June Legal Update

1. WaterFix Validation Action

CDWR Impact Cases (JCCP 4942)

The Validation Action¹ brought by the Department of Water Resources (DWR) was coordinated on April 10, 2018, in Sacramento Superior Court, with the California Environmental Quality Act (CEQA) lawsuits over the FEIS/R prepared for the WaterFix project, as CDWR Environmental Impact Cases, Judicial Council Coordination Proceeding No. 4942. (JCCP 4942). At the same time, two other WaterFix related lawsuits brought under California's Endangered Species Act (CESA) were also coordinated as JCCP 4942.² Due to the many disputes between parties over when, where and how the court should hear the coordinated claims, presiding Judge Kevin R. Culhane requested briefing on the sequence that he will hear the various CEQA, CESA, and Validation claims. All parties in opposition to the Validation Action ask the court to put the Validation Action on hold while it resolves the CEQA claims. Friends of the River, Natural Resource Defense Council and North Delta Water Agency specifically requested that the CESA claims be heard alongside the CEQA claims.

Parties in opposition to the Validation Action argue validation of state bonds to fund WaterFix is premature and in violation of CEQA as the bonds will provide impetus to the project. Some parties assert that resolution of the Validation Action will prejudice or foreclose further consideration of issues that overlap with CEQA lawsuits because California Code of Civil Procedure section 870 provides that a validation judgment becomes "forever binding and conclusive, as to all matters therein adjudicated or which at that time could have been adjudicated..."

DWR's position, backed by Metropolitan, is that the scope of Validation Actions are narrow. Only whether the proposed financing for the project is valid is at issue and, therefore, the scope of the Validation Action should be limited to the validity of the bonds, the resolutions that authorize them, and the pledge of revenue for repayment. DWR argues that all affirmative defenses and other issues raised by parties that overlap with the validity of how the bonds are used in relation to CEQA, CESA, the Delta Reform Act and other area of origin water laws should be dismissed. Broadly, opposing parties respond that the scope of the Validation action cannot be limited as DWR suggests because the validity of DWR's resolutions are dependent on compliance with CEQA and other legal obligations.

A case management conference was held on May 24, 2018 where DWR suggested a noticed motion process to resolve the scope of the Validation Action. Other parties requested discovery as an option to develop the record. Judge Kevin R. Culhane asked that parties first attempt to

¹ *California Department of Water Resources v. All Persons Interested in the Matter of the Authorization of California WaterFix Revenue Bonds* [seeking approval of state bonds to partially fund a new unit (WaterFix) of the Central Valley Project].

² *Bay.org v. California Department of Fish and Wildlife* and *North Delta Water Agency v. California Department of Fish and Wildlife*.

resolve disputes over the scope of the Validation Record, finding resolution of the record will clarify what issues will be addressed in the Validation Action. Another case management conference is scheduled for July 26, 2018 where the court intends to address whether the CESA claims should be heard concurrently with the CEQA claims and, hopefully, make a decision on the sequencing of the Validation Action.

2. Water Agencies Long-Term Water Transfer Program EIR/EIS

AquAlliance, et al. v. U.S. Bureau of Reclamation, et al.

On June 7, 2018, in the Eastern District Federal Court, Judge Lawrence J. O'Neill vacated the final Environmental Impact Statement/Report (FEIS/R) and Biological Opinion (BiOp) relied on by San Luis & Delta-Mendota Water Authority and the Bureau of Reclamation in 2015 to approve a 10 year water transfer program. The Project's purpose was to facilitate water transfers from sellers upstream of the Delta to users south of the Delta – when those sales use Central Valley Project (CVP) and/or State Water Project (SWP) infrastructure – as a means to address the severe reduction in CVP water supplies that occurs during dry years. Project water for transfer would have primarily been made available through groundwater substitution, cropland idling and crop shifting.

Prior to the court's determination on vacatur, the FEIS/R and the BiOp were both found unlawful by Judge Lawrence J. O'Neill on February 15, 2018. In resolution of the parties Cross-Motions for Summary Judgement, the court's order found the FEIS/R failed to reconcile its findings on climate change impacts under NEPA and to integrate existing Delta water quality conditions as required by CEQA. The court further found the FEIR/S deficient in its treatment of groundwater as it related to mitigation, monitoring, and third party impacts. Finally, the BiOp was found deficient under the Endangered Species Act as it failed to explain how the conservation measures adopted would avoid jeopardy of the Giant Garter Snake.

Defendants requested remand without vacatur of the FEIR or the BiOp. However, vacatur is the normal remedy without showing there will be harm to the environment or another public interest that cannot be repaired in the future. The court vacated the FEIS/R finding “there will be no irreparable harm whatsoever caused by vacating the FEIS/R.”³ After consideration of the delay that would result from vacatur of the BiOp the court reasoned delay alone could not tip the scale from vacatur warranted by the seriousness of the deficiencies in the BiOp and the mandate for “institutionalized caution” in ESA claims.⁴

³ Memorandum and Decision Re Post-Judgement Vacatur (June 7, 2018) p. 6, In. 1-2.

⁴ Memorandum and Decision Re Post-Judgement Vacatur (June 7, 2018) p. 7, In. 1-3.